SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-006400 03/04/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

DONALD LEE WIEGERT

STEPHEN A U'REN

v.

STATE OF ARIZONA DEPARTMENT OF ECONOMIC, et al.

STATE OF ARIZONA DEPARTMENT OF ECONOMIC
P O BOX 608
FLORENCE AZ 85323-0000

DEBORAH VARNEY
BEVERLY HINES
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CHILD SUPPORT DIVISION
PO BOX 608
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MINUTE ENTRY

Pursuant to A.R.S §12-910(e) this court may review administrative decisions in special actions and proceedings in which the State is a party:

> The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

The scope of review of an agency determination under administrative review places the burden upon the Plaintiff to demonstrate that the hearing officer's decision was arbitrary,

capricious, or involved an abuse of discretion.[1] Only where the administrative decision is unsupported by competent evidence may this court set it aside as being arbitrary and capricious.[2] A reviewing court may not substitute its own discretion for that exercised by an administrative agency,[3] but must only determine if there is any competent evidence to sustain the decision.[4] In this case there is no record of an administrative hearing except the finding of the Pinal County Attorney that child support arrearages exist. The parties have agreed that only legal issues shall be determined in this case.

This matter has been under advisement and the Court has considered and reviewed the record of the proceedings, exhibits made of record and the Memoranda submitted.

In the case at hand the Plaintiff Donald Lee Wiegert was ordered to pay his ex-wife (co-defendant) $600 per month, beginning June 1998, until a wage assignment was in effect. The consent decree did not mention any arrearages by Plaintiff. More than a year later, Plaintiff's ex-wife filed a petition to modify the child support, yet failed to mention child support arrearages. On December 21, 1999, Expedited Services issued a report and found no arrearages at that time. On January 25, 2000,Plaintiff's ex-wife, in response to his objection to a child support increase, failed to mention arrearages. On April 24, 2000, in a contested hearing concerning increased child support, Judge Pendleton Gaines made no findings of arrearages. After estimates of exaggerated arrearages, the Department of Economic Security has determined the amount of arrearages to be $925 (the June '98 child support payment plus interest).

The only issue is whether the doctrines of collateral estoppel, claim merger, and *res judicata* bar the claim for the $925 child support arrearage. The application of the doctrine of collateral estoppel requires that the following five conditions be met: 1) the issue was actually litigated in the previous proceeding; 2) there was a full and fair opportunity to litigate the issue; 3) resolution of the issue was essential to the decision; 4) there was a valid and final decision on the merits; and 5) there is common identity of the parties.[5] The first requirement for collateral estoppel was not met; nothing on the record indicates that the issue was actually litigated in a previous proceeding. Further, it is worth noting that collateral estoppel does not apply to consent judgments.[6] Therefore the doctrine of collateral estoppel is not a defense to claims of arrearages in this case.

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[1] *Sundown Imports, Inc. v. Ariz. Dept. of Transp.*, 115 Ariz. 428, 431, 565 P.2d 1289, 1292 (App. 1977); *Klomp v. Ariz. Dept. of Economic Security*, 125 Ariz. 556, 611 P.2d 560 (App. 1980).

[2] *City of Tucson v. Mills*, 114 Ariz. 107, 559 P.2d 663 (App. 1976).

[3] *Ariz. Dept.of Economic Security v. Lidback*, 26 Ariz. App. 143, 145, 546 P.2d 1152, 1154 (1976).

[4] *Schade v. Arizona State Retirement System*, 109 Ariz. 396, 398, 510 P.2d 42, 44 (1973); *Welsh v. Arizona State Board of Accountancy*, 14 Ariz.App. 432, 484 P.2d 201 (1971).

[5] *Irby Const. Co. v. Arizona Dept. of Revenue*, 184 Ariz. 105, 907 P.2d 74 (Ariz.App. 1995).*Chaney Bldg. Co. v. Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986); *Gilbert v. Board of Medical Examiners*, 155 Ariz. 169, 174, 745 P.2d 617, 622 (App.1987).

[6] *Suttle v. Seely*, 94 Ariz. 161, 382 P.2d 570 (1963).

However, the doctrines of claim merger and *res judicta* do apply to this case and bar defendants from bringing a claim of arrearages stemming from the June 1998 child support payment. The doctrine of claim merger allows for the cause of action to merge into a judgment. A party who has had one fair and full opportunity to prove a claim in a court of competent jurisdiction is prevented from bringing an action on the merits of the claim a second time.[7] Both the orderliness and reasonable time-saving of judicial administration require that this be so, unless there is some overriding consideration of fairness to a litigant,[8] which the circumstances of the particular case do not dictate. The defendants had ample opportunities to bring the action for arrearages, or claim for arrearages in the consent decree and subsequent petitions and hearings.

Under the doctrine of *res judicata*, a valid final judgment is conclusive on the parties or their privies as to every issue decided and every issue raised by the record that the court could have decided.[9] The Restatement (Second) of Judgements[10] and the clear majority of courts employ a "transactional" test for determining whether the causes of action are the same.

> [T]he prevailing view in the courts is in favor of requiring a plaintiff to present in one suit all of the claims for relief that he may have against the defendant arising out of the same transaction or occurrence. If the plaintiff had such an opportunity to litigate in the first action, its second attempt should be--and generally is--barred. The transactional test prevents what virtually all courts agree a plaintiff should not be able to do: revive essentially the same cause of action under a new legal theory. [11]

Here, the issue of arrearages arose out of the same occurrences and events as did the consent decree, the petitions for modification, and Pinal County reports. Defendants had ample opportunity to litigate the issue of arrearages, yet they come now to bring an action that could have been brought before the court years ago. The modern rule prevents such re-litigation. If the new claim is closely related to the first--because it arises out of the same events--it could and should have been asserted in the first action. [12]

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[7] *Di Orio v. City of Scottsdale*, 2 Ariz.App. 329, 408 P.2d 849 (Ariz.App. 1965).
[8] *Id*.
[9] *Pima County Assessor v. Arizona State Bd. of Equalization*, 195 Ariz. 329, 987 P.2d 815, 305 Ariz. Adv. Rep. 23 (Ariz.App. 1999); *Hall v. Lalli*, 194 Ariz. 54, 977 P.2d 776, 299 Ariz. Adv. Rep. 9 (Ariz. 1999); *Heinig v. Hudman*, 177 Ariz. 66, 865 P.2d 110 (Ariz.App. 1993).
[10] §24 (1982).
[11] *Phoenix Newspapers, Inc. v. Department of Corrections, State of Ariz.*, 188 Ariz. 237, 241, 934 P.2d 801, 805, 239 Ariz. Adv. Rep. 17 (Ariz.App. 1997).
[12] *Phoenix Newspapers, Inc.* 188 Ariz. at 241, 934 P.2d at 805, 239 Ariz. Adv. Rep. 17.

After a careful review this court finds that the Department of Economic Security's decision finding child support arrearages was contrary to law. This court determines that no child support arrearages exist between these parties.

IT IS ORDERED granting Plaintiff's request for attorney's fees and costs. Counsel for the Plaintiff shall prepare and lodge an application and affidavit for attorney fees and costs, and lodge the same with an order consistent with this opinion on or before April 2, 2003.

IT IS THEREFORE ORDERED reversing and vacating the decision of the Arizona Department of Economic Security - Child Support Division.

IT IS FURTHER ORDERED Denying the Defendants' requests for attorney fees.